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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

DAVID MAX, Plaintiff and Appellant, v. GEORGE SHIH et al. Defendants and Respondents.	B301010 (Los Angeles County Super. Ct. No. BC645117)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Rogari Law Firm and Ralph Rogari for Plaintiff and Appellant.

Law Offices of Stephen J. Riggs, and Stephen J. Riggs for Defendants and Respondents.

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David Max, a shareholder of 8e6 Corp. (the corporation), sued George Shih, Frank Wood, Rodney Miller, Mahendra Vora, and Vora Ventures, LLC (collectively, defendants) for breach of fiduciary duty arising from the corporation's liquidation and distributions of its assets to shareholders. The court granted defendants' motions for summary judgment and, after the entry of judgment, Max appealed.

Max contends: (1) the court erred in denying his motion to enter defendants' defaults; and (2) summary judgment was improper because the defendants owed him fiduciary duties and that triable factual issues existed as to whether they breached such duties. We conclude the court did not err in denying Max's motion to enter defendants' defaults and, reviewing the summary judgment motions de novo, conclude that there are no triable issues of material fact and defendants are entitled to judgment as a matter of law. We therefore affirm the judgment.

FACTUAL SUMMARY

From 1995 until 2008 the corporation operated a business that provided Internet filtering and security products. According to Shih, an officer of the corporation since its founding, the corporation "developed and sold a unique internet filtering solution—a 'black box,' plug-and-play filter that schools, governmental agencies, and private businesses simply attached to their internet connection to filter out viruses and objectionable websites."

Between 1997 and 2000, the corporation raised capital by issuing three series of preferred shares—Series A, Series B, and Series C. Wood and Vora, two of the three directors of the corporation, hold 73,791 Series C preferred shares and 71,429

Series C preferred shares, respectively.[1] Shih, the third director, and Miller, the corporation's current or former chief financial officer, hold common shares only.[2]

Vora Ventures, a limited liability corporation managed by Vora, has held or holds unexercised warrants to purchase 150,000 Series C preferred shares, but has never been a preferred or common shareholder of the corporation.

Max, the plaintiff, holds 15,580 common shares in the corporation, for which he paid $40,000 in 1997.

According to the corporation's articles of incorporation (the articles), in the event of the corporation's liquidation, dissolution, or winding up, preferred shareholders are entitled to be paid a "liquidation preference" payment before any distribution is made to common shareholders. Specifically, Series A shareholders shall receive $3.92 per share, and Series B and Series C shareholders shall receive $7.00 per share. The liquidation preferences equal the amount the original preferred shareholders paid to the corporation for the preferred shares. If the preferred shareholders receive their entire liquidation preference payment, the corporation distributes the remaining funds pro rata to common shareholders. For purposes of this distribution, preferred shareholders are deemed to hold common shares in the same number as their preferred shares. Preferred shareholders would thus receive their liquidation preference

[1] Woods apparently held his preferred shares indirectly through two entities: Trebuchet Corporation and Darwin Group, LLC.

[2] Shih owns 408,100 shares, and Miller owns 10,000 shares.

payment plus a share of any additional funds along with common shareholders on a pro rata basis.

Liquidation or dissolution of the corporation requires a majority vote of each class of preferred shareholders. Although similar voting rights for common shareholders are not specified in the articles, common shareholders are entitled by law to vote on the voluntary dissolution and winding up of the corporation. (Corp. Code, § 1900, subd. (a).)[3] The vote may take place by shareholders submitting their "written consent" to the action.

In 2008, the corporation's operating subsidiary merged with another company to form a new entity—M86 Security System—with the corporation receiving stock in M86 Security System. Since then, the corporation has had no active operations.

In 2012, Trustwave Holdings, Inc. (Trustwave) acquired M86 Security System with the corporation receiving stock in Trustwave in exchange for its shares in M86 Security System. After that transaction, the corporation's only assets were shares in Trustwave.

In 2015, Singapore Telecommunications Limited (Singtel) purchased Trustwave's assets for cash. Trustwave distributed

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[3] The articles provide for the right of preferred shareholders to vote on "liquidation" of the corporation, as well as "dissolution." Dissolution, which requires compliance with certain statutory requirements, including approval by shareholders with "50 percent or more of the voting power" (Corp. Code, § 1900, subd. (a)), is distinguished from "informal liquidation, which may be accomplished by sale of all of [the corporation's] assets, abandonment of its corporate activities, and distribution of its property among its creditors and shareholders." (Ballantine & Sterling, Cal. Corporation Laws (2020) § 313.)

the proceeds from the sale to Trustwave's shareholders, including the corporation, in four tranches between November 2015 and June 2017. The corporation received a total of $13,477,273.32.

After the Singtel-Trustwave transaction, the corporation's board of directors—Shih, Wood, and Vora—determined it was in the best interests of the corporation to distribute its assets, net of liabilities, to the corporation's shareholders in accordance with the articles. Based on the liquidation preference provisions in the corporation's articles and the number of preferred shares, $10,557,140 would need to be distributed to the preferred shareholders before common shareholders received any funds.

In November 2015, the corporation's board sent a letter to the corporation's shareholders, including Max, informing them of the plan to distribute the net proceeds from the Trustwave transaction "to its shareholders" in accordance with the articles, and specifying that preferred shareholders shall receive their liquidation preferences before any distribution is made to common shareholders.

The corporation sent an update in a "Letter of Transmittal" to the shareholders in December 2015. This document included what the parties refer to as a "waterfall" calculation—a spreadsheet showing the anticipated funds from Trustwave, certain deductions, and the proposed distribution to shareholders. The letter explained that the corporation had received the first tranche of proceeds, of which $10,470,255.92 would be available to shareholders. The entirety of this initial tranche would be paid to the preferred shareholders. The corporation anticipated receiving an additional $2,695,264.37, of which $86,880 would be paid to preferred shareholders to satisfy the liquidation preferences. The remainder would be available to common shareholders. The corporation estimated that the amount payable to common shareholders would be $0.71 per share.

In March 2016, Miller updated the waterfall calculation at Shih's request. According to the update, the estimate of the amount common shareholders would receive was reduced to $0.52 per share.

In March 2016, the corporation's board approved a form of written consent of the shareholders stating that it has " 'determined it to be in the best interests of the [corporation] and its shareholders [for the corporation] to liquidate and, in connection with such liquidation, to distribute the [Trustwave] Sales Proceeds to the shareholders of the [corporation] in accordance with the [corporation's] [a]rticles.' " The form sought the shareholder's consent for the corporation "to effect the distribution of the [Trustwave] Sale Proceeds to the shareholders of the [corporation] in accordance with the [corporation's articles]."

Holders of a majority of each class of preferred and common shares[4] executed and returned written consents to the corporation. If defendants' consents are excluded, the corporation still received consents from the holders of a majority of each shareholder class. Max did not consent.

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[4] Although the corporation used the term "liquidation" in connection with the subject distribution, which arguably does not require common shareholder approval under the articles or the law (see fn. 3, ante), it obtained the consent for the challenged distribution from the holders of a majority of the common shares.

In May 2016, the corporation's board formally approved of the plan to liquidate and distribute the Trustwave proceeds to shareholders.

In May and September 2016, the corporation distributed, in two parts, the amounts due as liquidation preferences to the preferred shareholders.

As Series C preferred shareholders, Wood and Vora received $516,537 and $500,000, respectively.

Shih and Miller are common shareholders only and had not received any distribution as shareholders.[5] Vora Ventures did not receive a distribution.

In July 2017, the corporation sent a letter to shareholders with an updated waterfall calculation. According to this update, the distributions to preferred shareholders had been completed and the corporation held approximately $1,315,166 for distribution to the shareholders.[6] The estimate of the amount that common shareholders would receive was now $0.36 per share. By that time, Max had filed the underlying lawsuit. The corporation's board decided not to distribute the remaining sums to shareholders because of uncertainty created by this litigation.

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[5] Shih received $60,000 and Miller received $25,000 out of the funds received from Trustwave as compensation for services performed for the corporation.

[6] The waterfall calculation attached to the July 3, 2017 letter to shareholders states that the amount available for distribution to shareholders is $1,315,166.12. In their separate statement of undisputed facts, defendants state that the July 3, 2017 letter informed shareholders that $1,280,708.70 remained to be distributed to the shareholders. Max did not dispute this fact. The discrepancy between the two figures is not explained, but is not material.

PROCEDURAL HISTORY

In December 2016, Max filed a complaint against the corporation, the defendants, and others. Max alleged a cause of action against the corporation for breach of the corporation's obligation to permit shareholders to inspect its books and records. He alleged against defendants causes of action for breach of fiduciary duty and conversion.

On February 10, 2017, the corporation filed a motion for change of venue, which stayed further proceedings in the case. The hearing on the motion was set for July 13, 2017.

Max did not file an opposition to the motion to transfer venue. Instead, on July 5, 2017, Max requested, and the court clerk entered, the dismissal of the corporation from the action without prejudice. Two days later, Max filed and served on the corporation's counsel a notice asserting that "[t]he court no longer has jurisdiction to consider [the corporation's] motion to transfer the action and that motion is moot." Max also took the position that his dismissal of the corporation had the effect of lifting the stay that had been in place since the filing of the motion to change venue. Max then filed requests to enter the defaults of Miller and Shih on July 7 and 10, respectively, and of Wood, Vora, and Vora Ventures on July 13.

The court clerk rejected each of Max's requests for entry of default for a variety of reasons. As to each, the clerk noted that the address of Max's counsel on the request forms did not match the address "on file."[7] As to the requests to enter Shih's and

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[7] Max's complaint states his counsel's address is 12121 Wilshire Boulevard, Los Angeles. The requests for entry of default state the address is 12100 Wilshire Boulevard, Los Angeles.

Miller's defaults, the clerk noted that the "Notice to Person Served on the Proof of Service is . . . in error." The clerk also determined that the request to enter Shih's default was "premature," and the request to enter Miller's default was missing an original signature on the proof of service of the statement of damages. Regarding the requests to enter defaults as to Wood, Vora, and Vora Ventures, the clerk further noted that an original proof of service of the summons and complaint had not been filed and the process server's signature on the proof of service of the statement of damages was not an "original signature[ ]."

After counsel for the corporation learned that Max had dismissed the corporation from the action, the corporation filed a "response to putative notice that motion to transfer is moot" and a "notice that [Max's] putative dismissal of [the corporation] is void" (capitalization omitted), requesting the court hear and grant its motion to change venue. According to the corporation, Code of Civil Procedure[8] section 581, subdivision (i) precludes its dismissal while its motion to change venue was pending.

The motion to change venue was called for hearing on July 13, 2017. The court had tentatively ruled to grant the motion. After argument, however, the court dismissed the motion as moot based on the corporation's dismissal from the action.

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[8] Subsequent unspecified statutory references are to the Code of Civil Procedure.

The next day, July 14, 2017, Shih, Wood, Miller, and Vora filed motions to change venue. The court subsequently denied the motions as untimely.[9]

On August 22, 2017, Max applied ex parte to have the court enter the defaults the clerk had rejected in July. In opposing the application, defendants argued that the corporation's motion to change venue had stayed proceedings in the case and that Max's ex parte application was a continuation of his "scheme to improperly dismiss [the corporation] . . . in order to 'moot' [the corporation's] motion to transfer venue, avoid sanctions, secretly lift the stay of proceedings, and thus try and 'sandbag' the [d]efendants by the entry of 'stealth' defaults against each of them."

The trial court denied Max's application on the ground that the court clerk had properly rejected the requests to enter the defaults. Max then filed a noticed motion to enter the defaults, which the court denied on October 16, 2017.

On March 29, 2018, Max filed the operative first amended complaint against defendants and others, alleging causes of action for "conspiracy to defraud" and "breach of fiduciary duty." (Capitalization omitted.) In support of the cause of action for breach of fiduciary duty, Max alleged that the defendants, as officers, directors, or preferred shareholders of the corporation owed fiduciary duties to Max. According to Max, "dissolv[ing]" the corporation and distributing all of the assets to the shareholders "was not in the best interests of the common shareholders." Such a distribution, he alleged, "would solely benefit the preferred shareholders and leave the investment of

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[9] The defendants do not challenge this ruling on appeal.

the common shareholders such as [Max], worthless." The defendants, he alleged further, "engaged in self-dealing" when they "secretly transferred" the Trustwave proceeds "to themselves." The defendants' actions allegedly constitute breaches of fiduciary duties that rendered his stock in the corporation worthless.

The court sustained defendants' demurrers as to the conspiracy cause of action with leave to amend and overruled the demurrer as to the breach of fiduciary cause of action. Max did not file a further amended complaint and the defendants thereafter filed an answer.

In May 2018, the defendants filed a motion for an order requiring Max to post a bond pursuant to Corporations Code section 800. The defendants asserted that a bond was required because Max's action is a derivative action that has no reasonable possibility of prevailing on the merits. The court denied the motion on two grounds. First, the motion was untimely. Second, Corporations Code section 800 did not apply because Max's action "is not a derivative action." "The gravamen of [Max's] first amended complaint," the court explained, "is *not* injury to [the corporation] and [Max] does not seek to assert a cause of action which [the corporation] possesses."[10]

In January 2019, defendants filed motions for summary judgment. They asserted that they did not owe a fiduciary duty to Max and, if any such duty was owed, they did not breach that

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10 Max asserts that the court also rejected defendants' argument that his cause of action is a derivative action in overruling defendants' demurrer to breach of fiduciary cause of action in the first amended complaint. His citations to the record, however, do not support the assertion.

duty. Their contention that they did not owe a fiduciary duty to Max was based in part on the argument that any duties the defendants allegedly breached were owed to the corporation or to the shareholders generally, not to Max individually, and the cause of action must therefore be asserted as a derivative action on behalf of the corporation.

In opposing the motions, Max asserted alternative theories for his claims: the defendants—as directors, officers, or controlling shareholders—wrongfully authorized the distribution of the Trustwave proceeds; and the distribution unfairly benefited the preferred shareholders (including two of the defendants) at the expense of common shareholders.

On April 29, 2019, the court granted the motions for summary judgment. The court explained that defendants had met their burden of establishing that Max's alleged injury "was not individual to [Max] or similarly situated common shareholders, but incidental of an injury to the corporation." The court acknowledged its prior ruling that Max's breach of fiduciary cause of action was not a derivative action, but explained that its present ruling was based on its review of the evidence and the different standards applicable to summary judgment proceedings. The court further stated that Max failed to submit evidence sufficient "to create a triable material fact as to whether [d]efendants owed [Max] a fiduciary duty individually." With respect to Shih and Miller, the court further explained that, if they did owe Max a fiduciary duty, they were entitled to summary judgment on the ground that they did not breach that duty as well. The court did not address the issue of breach of duty as to Wood, Vora, or Vora Ventures.

The court entered judgment on June 27, 2019.

Max moved for a new trial, which the court denied on August 26, 2019. He then timely appealed from the judgment.

DISCUSSION[11]

A. *The Trial Court's Denial of Max's Motion to Enter Defendants' Defaults*

Max contends that the court clerk was required to enter the defendants' default upon his requests in July 2017 and the court thereafter erred in denying his motion to enter the defaults. He argues that his requests to enter the defaults were proper and, therefore, "the trial court lacked jurisdiction to receive or file *any* appearance by [defendants], including their motions for summary judgment." He concludes that the orders granting summary judgment are void and that we should reverse the judgment and direct the trial court to enter the defendants' defaults.

Defendants argue, as they did below, that the clerk and court did not err in refusing to enter the defaults because the proceedings had been stayed by the corporation's motion to change venue and, therefore, the court had no power to enter the defaults. Even if the stay was lifted when Max dismissed the corporation from the action, defendants further argue, the

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[11] Defendants contend that Max has waived the issues raised on appeal because he failed: (1) to support arguments by appropriate references to the record; (2) to discuss the trial court's reasoning in granting summary judgment; (3) to include in the appellant's appendix the corporation's motion to change venue; and (4) to accurately cite to the record. Although we do not condone the practices defendants describe, we decline to hold that Max has waived any issue and we were able to address the issues by reviewing the record and the parties' collective briefing.

requests for entry of defaults were premature. We agree with defendants.

Subject to exceptions not applicable here, the filing of a motion to change venue stays proceedings in the case and "suspends the power of the trial court to act upon any other question until the motion has been determined." (*Beard v. Superior Court* (1940) 39 Cal.App.2d 284, 286; accord, *Moore v. Powell* (1977) 70 Cal.App.3d 583, 587; see *Nolan v. McDuffie* (1899) 125 Cal. 334, 336–337; 3 Witkin, Cal. Procedure (5th ed. 2020) Actions, § 914.) While the stay is in effect, "[n]o court ha[s] jurisdiction to receive a responsive pleading." (*South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 655 (*South Sutter*); see *Pickwick Stages System v. Superior Court* (1934) 138 Cal.App. 448, 449 [defendants were not required to file answer to complaint while motion to change venue was pending].)

If the court denies a motion to change venue, defendants who have not previously responded to the complaint must be given time—ordinarily 30 days— to file a responsive pleading. (§ 396b, subd. (e); Cal. Rules of Court, rule 3.1326; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2019) ¶ 3:590.)

Here, the parties dispute whether the court's dismissal of the corporation on July 5, 2017 pursuant to Max's request was valid and, if valid, whether the dismissal immediately lifted the stay imposed by the corporation's filing of its motion to change venue. The defendants argue that the purported dismissal was ineffective under section 581, subdivision (i), which provides: "No dismissal of an action may be made or entered, or both, under paragraph (1) of subdivision (b) [including plaintiff's written request to the clerk] . . . if there is a motion pending for an order transferring the action to another court under the provisions of Section 396b."

Max, on the other hand, asserts that he had the right to dismiss the corporation under section 581, subdivision (c), which provides: "A plaintiff may dismiss his or her complaint, or any cause of action asserted in it, in its entirety, or as to any defendant . . . with or without prejudice prior to the actual commencement of trial." (§ 581, subd. (c).) Max relies on *Rogers v. Transamerica Corp.* (1935) 6 Cal.App.2d 340, which held that a "defendant cannot, by making a demand for a change of venue, deprive the plaintiff of [his or her] right to dismiss, and the rule that no judicial action can be taken pending such a demand has no application." (*Id.* at p. 341.) As the corporation points out, however, *Rogers* was decided in 1935 before the Legislature added the language to section 581 that now appears to prevent the dismissal of an action while a motion to change venue is pending. (§ 581, subd. (i).)[12]

We need not decide the statutory interpretation issues raised by these arguments or determine whether *Rogers* remains good law. Even if the July 5, 2017 dismissal of the corporation was valid and had the effect of mooting the corporation's motion and lifting the stay at that time, the defendants were

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[12] At the time *Rogers* was decided, section 581 did not prevent a plaintiff from dismissing a case while a motion to change venue is pending. (Stats. 1933, ch. 744, § 88, pp. 1868-1869.) In 1974, the Legislature amended the statute to preclude a plaintiff from dismissing an action when there is a "motion pending for an order transferring the action to another court under the provisions of section 396b." (Stats. 1974, ch. 1369, § 4, p. 2966.) Since then, no court has cited *Rogers* in a published opinion to support the point for which Max cites it.

entitled to additional time thereafter to file a responsive pleading. Although the statute and rule of court authorizing additional time to respond expressly refer to the *denial* of a motion to change venue (§ 396b, subd. (e); Cal. Rules of Court, rule 3.1326), not to motions rendered moot by a plaintiff's dismissal of the moving party, the effect of the dismissal is the same: The corporation was denied the relief it sought in its motion. Defendants were thereby entitled additional time to respond. In the absence of the court ordering otherwise, defendants had 30 days from, at least, July 5, 2017. Max's requests to enter defaults, which were made on July 8, 10, and 13, were therefore premature.

Even if we narrowly construed the statute and rule of court authorizing the additional time to respond to apply only when a court expressly denies or grants a motion to change venue, additional time to respond was required to satisfy defendants' right to due process. Due process requires that, prior to depriving one of life, liberty, or property, the person be given reasonable notice and an opportunity to be heard. (*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313.) As noted above, the defendants were precluded by the stay from filing responsive pleadings; they had to wait until that motion was resolved. (See *South Sutter*, *supra*, 193 Cal.App.4th at p. 655.)

Because the hearing on the corporation's motion was set for July 13, 2017, it appeared that the motion would not be resolved—or the stay lifted—until then, at the earliest. Even if Max's July 5 dismissal of the corporation mooted the motion and lifted the stay, Max did not provide notice of these events to the defendants. Nor does it appear that Max or his counsel contacted any of the defendants or the corporation's counsel to inform them, formally or informally, that Max intended to request defendants' default. Thus, although defendants had notice of the action when they were served with the summons and complaint, they had not been informed that the stay that arose from the filing of the corporation's motion had arguably been lifted or that Max would request, or the court permit, entry of their default prior to or on the scheduled hearing date of the motion. Indeed, in light of the statute and court rule providing additional time to respond to a complaint after the court rules on the motion, defendants had no reason to expect that their response to the complaint would be due before August 12, 2017—30 days after the July 13, 2017 hearing date. (§ 396b, subd. (e); Cal. Rules of Court, rule 3.1326.) Under these facts, Max's requests for entries of default in early July 2017, if granted (and not ultimately set aside), would have deprived defendants of an opportunity to defend themselves in the case before they had notice that they could even file a responsive pleading. That result would have denied them their right to due process. The court, therefore, did not err in denying Max's requests to enter the defaults.[13]

Max does not address in his opening brief the effect of the stay that was in place while the motion to change venue was pending or the defendants' right to have 30 days to respond following a ruling on that motion. In his reply brief, he asserts

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[13] Statutory and constitutional concerns aside, we disapprove of Max's counsel's conduct in requesting entry of defaults as gamesmanship that would have, if counsel had been successful, compelled either the trial court or this court to set aside any default entered.

that because the court determined that the corporation's motion to change venue was moot, it never actually ruled on the motion; it is thus still "in the court file, undecided." Therefore, he argues, if defendants are correct that there was a stay of the proceedings while the motion was pending, that stay remains in effect and the court did not have the power to rule on the motions for summary judgment. The argument is frivolous. The motion to change venue is not pending; the court denied that motion when it dismissed the motion as moot on July 13, 2017.

Max also argues that the stay does not prevent the court from acting upon matters that are " 'incidental or ancillary to consideration of and action upon the motion for transfer itself.' " He relies on *City of Oakland v. Darbee* (1951) 102 Cal.App.2d 493 (*Darbee*) and *Pfefferle v. Lastreto* (1962) 206 Cal.App.2d 575 (*Pfefferle*). In both cases, the courts held that the trial court could rule on a motion to sever the case notwithstanding a pending motion to change venue. (*Darbee*, *supra*, 102 Cal.App.2d at pp. 503–504; *Pfefferle*, *supra*, 206 Cal.App.2d at pp. 580–581.) In those cases, the "motion for separation bore a very definite relation to their motion for transfer" (*Darbee*, *supra*, 102 Cal.App.2d at p. 504) and it was proper for the court to rule on the motions to sever before the motion to transfer so that "the court could then apply to each of the plaintiff's cases the proper rules relating to place of trial." (*Pfefferle*, *supra*, 206 Cal.App.2d at pp. 580–581.) This rationale does not apply here, where the issue is whether the defendants' time for filing a response to the complaint is stayed, not whether the court may rule on a matter ancillary to the motion to change venue. A response to a complaint is not ancillary to the action. It and the complaint are the heart of the action.

For all the foregoing reasons, we reject Max's argument that the clerk and court's refusal to enter the requested response requires reversal.

B. *Summary Judgment*

1. *Summary judgment standards*

Summary judgment is proper when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 285; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843 (*Aguilar*); § 437c, subd. (c).) A defendant moving for summary judgment bears the initial burden of showing that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense to that cause of action. (*Aguilar, supra*, 25 Cal.4th at p. 849; § 437c, subd. (c).) If the defendant meets this burden, the plaintiff has the burden to demonstrate that there are one or more triable issues of material fact as to the cause of action or defense. (*Aguilar, supra*, 25 Cal.4th at p. 849.) A triable issue of material fact exists "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850.) "[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law." (*Ibid.*)

In reviewing summary judgment, "[w]e review the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017–1018.)

2. ***Standing***

Defendants contend that Max does not have standing to assert his claim and was required to pursue it, if at all, in a derivative action on behalf of the corporation. We agree in part.

" 'A stockholder's derivative suit is brought to enforce a cause of action which the corporation itself possesses against some third party, a suit to recompense the corporation for injuries which it has suffered as a result of the acts of third parties. . . . The stockholder's individual suit, on the other hand, is a suit to enforce a right against the corporation which the stockholder possesses as an individual.' " (*Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 107 (*Jones*).) "Whether a cause of action is derivative or can be asserted by an individual shareholder is determined by considering the wrong alleged." (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 228 (*Sole Energy*).) Even if the corporation has a cause of action for the wrong alleged, an individual shareholder may sue directly for the "same wrong" "where he [or she] is directly and individually injured." (*Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530.)

Here, Max's first amended complaint and his arguments in opposing summary judgment and on appeal indicate two distinct theories of liability: (1) The defendants breached a fiduciary duty by deciding to liquidate the corporation and distribute the proceeds from the Trustwave sale to the shareholders; and (2) The allocation of the distribution and the manner in which it was communicated to shareholders breached fiduciary duties owed to the common shareholders. Under the first theory, the conduct is allegedly wrongful because the decision to distribute the proceeds amounts to a de facto dissolution of the corporation when it should have continued in business. Under the second theory, the distribution is wrongful because it benefited the preferred shareholders at the expense of the common shareholders. The two theories are presented concisely in Max's argument in his motion for new trial: "[T]he evidence before the court was more than sufficient to support a jury finding alternatives to dissolution were available, i.e.[,] invest the money so that it grows to the benefit of all the shareholders. The evidence was also sufficient to support a jury finding the preferred shareholders obtained a benefit over the common shareholders—the preferred shareholders got the return of their entire investment in the corporation, the common shareholders nothing."

As to the first theory, it is "well established that a derivative action is the only appropriate remedy where the complaint of the plaintiff shareholder is that the corporation was deprived of the opportunity to increase its assets and net worth by the wrongful acts of the defendants." (Marsh's California Corporation Law (4th ed. 2020) § 15.11[2]; see *Anderson v. Derrick* (1934) 220 Cal. 770, 773 ["misfeasance or negligence on the part of the managing officers of a corporation, resulting in loss of its assets, . . . is an injury to the corporation for which it must sue" and a "stockholder cannot sue for damages because his stock is thereby rendered worthless"].) Although shareholders may be harmed by the reduced value of their stock in the corporation as a result of the company's loss, that harm is "merely incidental" to the injury to the corporation. (*Avikian v. WTC Financial Corp.* (2002) 98 Cal.App.4th 1108, 1116.) The alleged wrong the defendants committed in deciding to liquidate the corporation and distribute the Trustwave proceeds—thereby depriving the corporation of its only asset and the opportunity to grow the company for "the benefit of all the shareholders"—is thus a wrong, if at all, to the corporation only. Max, therefore, does not have standing to assert that claim.[14]

The second theory—that the corporation's distribution of the Trustwave proceeds was wrongfully distributed so as to benefit the preferred shareholders at the expense of common shareholders—is not a wrong committed *against* the corporation; it is a wrong committed against those shareholders who allegedly received less than that to which they were entitled. This theory is reflected in the allegations in Max's first amended complaint, that the defendants breached fiduciary duties owed to common shareholders by causing the corporation to distribute the Trustwave proceeds in a manner that "would solely benefit the preferred shareholders and leave the investment of the common

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14 As to this theory advanced by Max, our holding is consistent with the trial court's conclusion that Max's cause of action for breach of fiduciary duty was derivative. Max contends that the trial court's ruling on that ground was an improper reconsideration of its prior ruling that the action was not a derivative action. We agree with the trial court, however, that in considering the summary judgment motions, it was not bound by its earlier rulings. (See *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 189 [ruling on demurrer did not prevent court from making contrary ruling on motion for summary judgment]; Corp. Code, § 800, subd. (d) ["[a] ruling by the court on the motion [for a derivative action bond] shall not be a determination of any issue in the action or of the merits thereof"].)

shareholders such as [Max], worthless." The loss of value in his shares is thus not due to actions that reduced the value of the corporation and, derivatively, the value of all shares in the corporation; rather it is due to a manner of distributing the corporate assets that, in Max's view, unfairly and inequitably benefited the preferred shareholders at the expense of him and other common shareholders. Because "the gravamen of [his] cause of action is injury to [him]self and the other [common] stockholders," he therefore has standing to assert the claim. (*Jones*, *supra*, 1 Cal.3d at p. 107; see also *Crain v. Electronic Memories & Magnetics Corp.* (1975) 50 Cal.App.3d 509, 521–522 (*Crain*) [minority shareholder had standing to assert claim against majority shareholders arising from actions the majority shareholders took that benefited them while "insur[ing] that the minority's shares will forever be valueless and unsalable"].)[15]

Because Max has standing to assert his claim individually as to his second theory of breach of fiduciary duty only, we limit our consideration of the merits of the summary judgment motions to that theory.

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[15] Defendants rely on *Sole Energy*, *supra,* 128 Cal.App.4th 212. In that case, putative shareholders in a corporation sued third parties under various tort theories for lost profits. The Court of Appeal affirmed judgment for the defendants because "the gravamen of the injury asserted—lost profits—was derivative and could not be recovered by [the putative shareholders] individually." (*Id.* at p. 232.) Here, Max's claim is not based on alleged lost profits caused by third party tortfeasors, but rather the corporation's manner of distributing its assets to shareholders. *Sole Energy* is thus distinguishable.

3. *Fiduciary duties*

Max's sole cause of action is for breach of fiduciary duty. The elements of that cause of action are the existence of a fiduciary duty, the breach of that duty, and damage proximately caused by that breach. (*IIG Wireless, Inc. v. Yi* (2018) 22 Cal.App.5th 630, 646; *Meister v. Mensinger* (2014) 230 Cal.App.4th 381, 395.) "[T]he existence of legal duty in the first instance and its scope are questions of law." (*Kirschner Brothers Oil, Inc. v. Natomas Co.* (1986) 185 Cal.App.3d 784, 790.)

Under California law, corporate directors, officers, and controlling shareholders, "in the exercise of powers that are theirs by virtue of their position," owe fiduciary duties to the corporation and minority shareholders. (*Jones*, *supra*, 1 Cal.3d at p. 110; see *Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 179 [it is "well established in California law" that directors, officers, and controlling shareholders owe fiduciary duties to shareholders].) These duties are, generally, "to act with honesty, loyalty, and good faith." (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1037; *Remillard Brick Co. v. Remillard-Dandini Co.* (1952) 109 Cal.App.2d 405, 419 ["[d]irectors owe a duty of highest good faith to the corporation and its stockholders"].) With respect to a decision to dissolve a corporation, directors and controlling shareholders may not, consistent with their fiduciary duties, approve a dissolution that works a fraud upon or " 'freeze[s] out' " minority shareholders. (*In re Security Finance Co.* (1957) 49 Cal.2d 370, 377.)

Here, it is undisputed that Shih, Vora, and Wood were directors of the corporation at the time they made the challenged decision and actions to liquidate the corporation and distribute the assets to the shareholders. As directors, they owed to the shareholders, including Max, a fiduciary duty to act in good faith and in a manner they believe "to be in the best interests of the corporation and its shareholders." (Corp. Code, § 309, subd. (a); see 1 Ballantine & Sterling, Cal. Corporation Laws, *supra*, § 102.01.) Whether they breached that duty to Max as a common stockholder is addressed in part B.3, *post*.

Whether Miller owed fiduciary duties to shareholders is more complex. Although a director has such duties by virtue of his or her position (Corp. Code, § 309, subd. (a)),[16] a corporate officer has fiduciary duties, if at all, not by being named as an officer, but by virtue of his or her participation in management and exercising discretionary authority. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 420–421; 1 Ballantine & Sterling, Cal. Corporation Laws, *supra*, § 102.02.) As one court stated, "a corporation cannot make a mail clerk its fiduciary by simply bestowing upon the clerk the title of officer." (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.*, *supra*, at p. 420.) Whether a defendant participates in management is ordinarily a question of fact. (*Id.* at p. 421.)

Miller was never a director of the corporation. He was its chief financial officer from April 2005 to August 2012. Miller

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[16] Corporations Code section 309, subdivision (a) provides: "A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances."

does not say whether he was an officer at any time thereafter. According to Miller's and Shih's declarations, Shih asked Miller in 2015 to calculate the distributions of proceeds from the Trustwave transaction sale. He did so, and prepared the waterfall spreadsheet included in the December 2015 letter to shareholders and updates of the waterfall in March 2016 and July 2017. These documents reflect his calculations of, among other figures, the amount available to the corporation from the Trustwave sale, the amount received to date, and the amount available for distribution to the various classes of the corporation's shareholders. Miller, at the direction of the corporation's board, also issued the payments to the preferred shareholders. He explains that he "did not vote to distribute the funds received from the Singtel [s]ale or make the decision to issue the distribution[;] [he] only performed the calculations pursuant to the [corporation's] [a]rticles." He also states that he was "not involved in requesting and collecting consent from the shareholders" for the distribution. Miller received $25,000 as "compensation for the services" he provided to the corporation.

In opposition to summary judgment, Max produced a statement of information signed by Shih and filed with the California Secretary of State on behalf of the corporation in November 2017 listing Miller as the corporation's chief financial officer. Max also submitted a similar form, signed by Shih in June 2015, but not filed, listing Miller as the corporation's chief financial officer. Max further relies on Miller's deposition testimony that Miller "assisted" the board in deciding to distribute the Trustwave proceeds.

Viewing the evidence favorably to Max, as we must, there is a triable issue as to whether Miller was an officer of the corporation during or after 2015 when he performed services related to the challenged liquidation and distribution. Neither Miller nor Shih deny that he was an officer at that time. Although Shih's representations on the corporation's statement of information that Miller was an officer are not dispositive, they provide some evidence that Miller was an officer at the relevant time. Whether the evidence of Miller's services for the corporation in and after 2015 were managerial or involved discretionary decision-making that qualify him as an officer are factual questions that cannot be decided at the summary judgment stage. Max, therefore, has met his burden of showing a triable issue as to whether Miller was an officer of the corporation with fiduciary duties to its shareholders.

We reach a different conclusion with respect to Vora Ventures. That entity, a limited liability corporation, was never an officer or director of the corporation. Vora, the managing member of Vora Ventures, and Shih state in their declarations that Vora Ventures was never a shareholder of the corporation. Vora Ventures thus satisfied its initial burden of production of showing that it was not among the class of persons or shareholders who owed a fiduciary duty to the corporation's shareholders.

Max asserts, however, that a triable issue of fact exists as to whether Vora Ventures is a shareholder based on two warrants, each for the purchase of 27,500 Series C preferred shares and which expired without being exercised, and a possible, undocumented third warrant that, if it exists and has not expired, could be used to acquire 150,000 common shares. Max also points to two forms of a written consent of shareholder that Vora signed in 2008 on behalf of Vora Ventures as a

"Shareholder." One pertained to the approval of the 2008 transaction that resulted in the sale of the corporation's operating subsidiary, and the other to certain amendments to the articles.

In 2016, the corporation had 3,511,776 shares. Thus, if Vora Ventures exercised the putative warrant (which would increase the total shares in the corporation to 3,661,776), it would have acquired the equivalent of approximately 4.1 percent of the corporation's shares. If Vora Venture's potential ownership of 150,000 shares is added to Vora's 71,429 shares, the collective amount would still comprise only approximately 6.0 percent of the total shares. Even if defendants are viewed, as Max alleged, as conspiring "to cash the preferred shareholders out of the corporation at the expense [of] common shareholders," the number of shares held or potentially held by all defendants would amount to only 19.5 percent of the corporation's shares. Therefore, even if the evidence of the warrants supports a finding that Vora Ventures is (or has the right to become) a shareholder at all, it does not constitute evidence that it, by itself or together with the other defendants, was ever a majority or controlling shareholder. The written consents of shareholder that Vora signed on behalf of Vora Ventures in 2008, which Vora states he may have signed because Vora Ventures was a creditor of the corporation, are also insufficient to create a triable issue. Vora Ventures, therefore, did not owe to Max a fiduciary duty and it is entitled to judgment on Max's claim as a matter of law.

4. *Breach of fiduciary duties*

Defendants contend that if they owed fiduciary duties to Max, there was no triable issue of material fact as to breach of those duties. We agree.

Max's cause of action for breach of fiduciary duty, insofar as he has standing to assert it, rests primarily upon two allegations of alleged wrongful conduct. First, the distribution of corporation's assets to the shareholders "would solely benefit the preferred shareholders and leave the investment of the common shareholders . . . worthless." Second, the defendants "chose to engage in self-dealing" by "secretly transferr[ing]" the money the corporation received from Trustwave "to themselves." In light of the evidence submitted in connection with the summary judgment motions and the arguments Max makes on appeal, the alleged secret transfers to defendants appear to consist of the liquidation preference payments the corporation made to the defendants who received such payments; namely, Wood and Vora.

Miller—the only defendant who arguably owed to Max a fiduciary duty who was not a director of the corporation—did not participate in the decisions to liquidate the corporation and distribute the assets to the shareholders and was not involved in requesting or collecting the written consents from shareholders. Indeed, Miller did not even give his consent to the liquidation and distribution plan as a common shareholder. His role consisted of preparing the waterfall spreadsheets and issuing the payments to the preferred shareholders.

Max has not pointed to any evidence suggesting that Miller failed to perform these tasks in good faith or otherwise breached a fiduciary duty owed to shareholders. Nor could Miller have engaged in self-dealing by transferring money to himself, as Max alleged, because Miller was not among the shareholders who received a distribution, and the only money he received out of the Trustwave proceeds was $25,000 as compensation for his services. Max has thus failed to show that there is a triable issue of material fact with respect to his claim as to Miller, and Miller is therefore entitled to judgment as a matter of law.

We now turn to the corporation's directors—Shih, Wood, and Vora. In evaluating whether a decision by a director breached a fiduciary duty, the director is entitled to a presumption, under the so-called business judgment rule, " 'that directors' decisions are based on sound business judgment, [which] prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest.' " (*Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 430; see generally 1 Ballantine & Sterling, Cal. Corporation Laws, *supra*, § 102.) The rule is a product of " ' " 'a judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.' " [Citations.] [It] is based on the premise that those to whom the management of a business organization has been entrusted, and not the courts, are best able to judge whether a particular act or transaction is helpful to the conduct of the organization's affairs or expedient for the attainment of its purposes.' " (*Berg & Berg Enterprises, LLC v. Boyle*, *supra*, 178 Cal.App.4th at p. 1045.)

Shih, Wood, and Vora point out that the amount that preferred shareholders received and the priority of such payments over payments to common shareholders is established by the articles. Such evidence satisfies the defendants' burden of producing evidence to establish that the distribution of the assets to shareholders in accordance with the articles was not a breach of a fiduciary duty.

Max contends that the business judgment rule does not protect the defendants from fraud, and that the defendants misrepresented to shareholders in the November and December 2015 letters that the distribution of the Trustwave proceeds were required by the articles. Max refers to a statement in the November 2015 shareholder letter that "[a]ny distribution of the [d]istributable [f]unds will be made in accordance with the [articles], which provides that funds available for distribution will be distributed to" the preferred shareholders in the amounts of the applicable liquidation preferences. He also refers to the following statement in the December letter of transmittal: "Based on the liquidation preferences set forth in the [articles], . . . all of the [i]nitial [p]ortion [of the Trustwave proceeds] will be paid to the holders of the [corporation]'s preferred stock." Max asserts that these statements are false because they suggest that the articles mandate distribution of the proceeds when, in fact, such distribution occurs only in the event of a liquidation, dissolution, or winding up, which requires the approval of a majority of the corporation's shareholders.

Indeed, the November and December 2015 communications to shareholders appear to assume, without expressly stating, that the distribution of proceeds will follow the corporation's liquidation. The reference to the "liquidation preferences" as a basis for the distribution in the December 2015 letter of transmittal, however, reasonably implies that the distribution will occur in connection with liquidation. Even if liquidation is not implied in the 2015 letters to shareholders, Max does not explain how the omissions were material or raise a triable issue of fact regarding the directors' good faith in making their decision to liquidate. Although he suggests that a fuller disclosure might have led the shareholders to reject the plan to liquidate, the suggestion is not reasonable because the alternative to liquidation is having the corporation retain the Trustwave proceeds, thereby depriving the shareholders of their use, when the corporation had no plan for using the money. Without assets (other than cash), intellectual property, employees, or business operations of any kind, there is nothing to suggest that the corporation could have put the Trustwave proceeds to a use more productive than distributing the proceeds to the shareholders themselves.[17] Indeed, Max does not suggest an alternative use for the funds. The fact that the 2015 letters to shareholders did not express what they implied—that distribution of the Trustwave proceeds would coincide with liquidation—does not, therefore, create a triable issue of material fact. Moreover, because Max did not tender his shares in response to the November and December 2015 letters or give his consent to the distribution, he did not rely on any misrepresentations in such letters and he offers no evidence that any other shareholder acted in reliance thereon. The alleged misrepresentations, therefore, are not actionable.

Max further argues that because Wood and Vora are preferred shareholders and the liquidation of the corporation would provide preferred shareholders with payment of the liquidation preferences that they wrongfully "use[d] their position

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[17] When Wood was asked at his deposition whether the corporation could have "found something good to invest that money in," rather than distribute it to shareholders, Wood responded: "With all due respect, that's about the dumbest idea I've ever heard."

of trust and confidence to further their private interests."[18] Max supports this argument with citations to *Jones*, *supra*, 1 Cal.3d 93 and *Crain*, *supra*, 50 Cal.App.3d 509.

In *Jones*, a majority of shareholders of a savings and loan association (S&L) whose stock was not publicly traded had a choice of strategies to take advantage of a "bull market in savings and loan stock" in the early 1960's. (*Jones*, *supra*, 1 Cal.3d at p. 113.) Under each strategy, the majority shareholders could create a publicly traded holding company for the S&L's shares, effectively making the S&L a subsidiary of the holding company. Under one strategy, all S&L shareholders would be permitted to exchange their shares for holding company shares. (*Ibid.*) Under a second strategy, only majority shareholders would receive shares in the publicly traded holding company. The majority shareholders implemented the second strategy, which allowed them to benefit from a public market in the holding company shares and effectively prevented the minority S&L shareholders from a similar benefit. (*Id.* at pp. 113–114.) In addition, the majority shareholders used their control of the holding company to appropriate the S&L's assets and earnings for their benefit and to the detriment of the S&L minority shareholders. (*Id.* at p. 114.) By using "their power to control

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[18] Max's argument implies that Wood and Vora, in order to avoid breaching a fiduciary duty, were required to vote against liquidating and distributing the Trustwave proceeds to shareholders. The result would be that the corporation would retain the proceeds for no productive purpose or gain. Again, Max fails to explain how the corporation's retention of the proceeds would be a more reasonable use of the funds than distributing them to the shareholders.

the corporation for the purpose of promoting a marketing scheme that benefits themselves alone to the detriment of the minority," the Supreme Court stated, the majority shareholders breached fiduciary duties owed to the minority shareholders. (*Id.* at p. 115.)

The decision by the defendant directors in the instant case to liquidate and distribute proceeds to the shareholders is not comparable to the strategy chosen by the majority shareholders in *Jones*. The choice facing the defendants in this case was to distribute the Trustwave proceeds to shareholders in the manner prescribed by the articles or retain the proceeds within the corporation. Distributing the proceeds to shareholders in a manner other than as prescribed by the articles was not an option.[19] Although, as a result of the liquidation preferences in the articles, distributing the proceeds to the shareholders would provide only a small benefit to the common shareholders, the directors could have reasonably concluded that there would have been even less benefit to the common and preferred shareholders if defendants had decided to retain the funds within the corporation. Given that the corporation was dormant and had no prospects for productive use of the funds, the possibility

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[19] In his declaration in opposition to the summary judgment motions, Max asserts that the Trustwave proceeds could have been distributed such that the preferred shareholders would have received their liquidation preference and the common shareholders would also have received what they had paid for their shares. Doing so, however, would have required that some common shareholders receive more per share than other common shareholders. Max does not offer any legal authority for treating shareholders of a single class differently.

that the corporation's retention of the funds would eventually benefit the common shareholders is purely speculative.

In *Crain*, the defendant directors and a majority shareholder used their position and power to cause the subject corporation to sell all its assets to a third party and use the proceeds from the sale to make an unsecured loan to the majority shareholder. (*Crain*, *supra*, 50 Cal.App.3d at p. 516.) The defendant directors then declared that the corporation would consider the minority plaintiffs' shares in the corporation worthless and that plaintiffs would be excluded from any distributions by the corporation. (*Id.* at p. 516.) The Court of Appeal held that the defendants' "self-enriching activities . . . impinged upon rights of the minority shareholders in two respects: (1) The defendants' acts deprived plaintiffs of their ownership interests in an ongoing and potentially profitable business without any compensation whatsoever; and (2) by 'locking' plaintiffs into a 'shell' corporation, which possesses no real assets nor engages in any kind of business activity, defendants insured that the minority's shares will forever be valueless and unsalable." (*Id.* at p. 521.)

Crain is patently distinguishable on its facts and Max does not assert that the case is analogous. Max, however, relies on the following language in that case: "In order to dissolve the corporation without giving rise to an action for breach of fiduciary duty, the majority must demonstrate that (1) no alternative to dissolution was available, and (2) that in dissolving the corporation the majority secured no benefit over the other shareholders." (*Crain*, *supra*, 50 Cal.App.3d at p. 522.) To the extent, arguendo, this language suggests that majority shareholders cannot dissolve a corporation or distribute its assets to shareholders if there is any alternative—even when the alternative is to have available funds languish in a dormant corporation—we reject it. Not only has this dictum from *Crain* been virtually ignored by courts since it was uttered 45 years ago, it is contrary to the business judgment rule and has been fairly criticized as "judicial overreaching" that should be "discarded." (McGinty, *Replacing Hostile Takeovers* (1996) 144 U.Pa. L.Rev. 983, 1036, fn. 129.) We decline to apply it here.

Ultimately, it appears from Max's complaint, his declaration opposing summary judgment, and his briefs on appeal, that he believes he was treated unfairly because the preferred shareholders received the liquidation preferences set forth in the articles and that, given the amount of money received from Trustwave, he will receive, at most, a fraction of the principal he invested in the corporation. This outcome, however, is a function of the articles' terms applied to the sum of the Trustwave proceeds. Neither is the result of any wrongdoing by defendants. Summary judgment is therefore proper.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.